

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UTILITIES MANAGEMENT	:	CIVIL ACTION
CONSULTANTS INC.,	:	
Plaintiff,	:	
	:	NO. 97-5865
v.	:	
	:	
INTERNATIONAL PAPER COMPANY,	:	
Defendant.	:	

M E M O R A N D U M

BUCKWALTER, J.

May 18, 1998

In the instant breach of contract action Defendant, International Paper Company ("IP"), seeks summary judgment in its favor and against Plaintiff, Utilities Management Consultants, Inc. ("UMC"). Several unresolved issues remain. In denying IP's motion, I list the major unresolved issues for the benefit of the parties, in the hope that it may help in the ultimate resolution of this case.

I. BACKGROUND

UMC, an energy consultant firm, helps companies decrease their energy bills by proposing and implementing savings programs. Although individually tailored, programs often include identification of untapped refunds, credits and tax exemptions and proposals for future energy savings. UMC charges clients on a "fee for savings" basis. Clients pay fifty-percent of any

refund or credit they receive as a result of UMC's services and fifty percent of all present and future savings secured by UMC for a period of thirty-six months beginning when the savings first appear on a client's bill or are otherwise realized.

On January 31, 1996 IP, a paper manufacturing company and UMC entered into the following one page Energy Agreement ("Energy Agreement") pursuant to which IP retained the services of UMC to review energy usage at the company's mill in Erie, Pennsylvania ("IP-Erie") in order to develop cost savings techniques.

We hereby authorize Utilities Management Consultants, Inc. (UMC) to analyze the rates, tariffs, discounts, riders and total charges that apply to our utility billings and to implement recommendations for possible savings, credits or refunds.

In lieu of a retainer fee for this analysis, we agree to pay you for your efforts as follows:

1 - Fifty-percent (50%) of any refund or credit you may secure for us from your analysis of our past bills;

2 - Fifty-percent (50%) of all present and future savings secured for us for a period of thirty-six (36) months beginning when the savings first appear on our bills or are otherwise realized.

All fee payments above will be made within thirty (30) days of the date on which a refund is received, the date a credit first appears on our bill, or the date on which past savings are otherwise realized.

(emphasis in original)

At that time most of IP-Erie's electrical needs and all of its steam needs were met internally. IP-Erie produced electrical energy through four on-site turbine generators and

purchased any excess energy needed from the Pennsylvania Electric Company ("PEC"). IP-Erie produced steam, which was used in part to run the generators, through five on-site boilers. To date, IP-Erie continues to meet its energy needs in this manner.

On May 6, 1996, after reviewing utility data and a three day site visit, UMC submitted a report entitled "Prioritized Savings Recommendation Areas" listing four recommendations, in order of importance, to cut electrical energy costs at IP-Erie. UMC's first proposal, entitled "Savings Area # 1" is the subject of the instant suit. In this recommendation UMC proposed the creation of an "Energy Profit Center" ("EPC") under which IP-Erie would be required to enter into a "buy-all, sell-all" relationship with PEC.

According to UMC, PEC operates capacity short -- it does not generate enough energy to meet its customers demands. Thus, PEC purchases extra electrical energy from other business with generators at a rate of about 8.5 cents per KWH. However, PEC continues to sell electrical energy at its normal rate of approximately 3.27 cents per KWH. Thus, UMC suggested that IP-Erie sell all electrical energy produced on-site to PEC at the 8.5 rate and then repurchase the energy needed to run the mill at the rate of 3.27. Using this strategy, UMC estimated that IP-Erie would save 15.5 million per year and 46.5 million over three years. Based on these figures UMC's fee would be 23.25 million.

In August 1996, UMC made a formal presentation of the EPC concept to management at IP-Erie. In turn management from IP-Erie was to present the concept to the company's main office in Memphis, Tennessee in October 1996. This meeting never occurred. UMC independently contacted the main office, but with no success. Thus, UMC received no feedback from IP on the EPC plan.

Finally, in May 1997, IP canceled the Energy Agreement, although it still continues to pay UMC fifty-percent of savings generated from Savings Area #4.¹ UMC filed suit claiming that IP breached the Energy Agreement when the company did not allow UMC to implement plans for an EPC and therefore owes UMC damages in an amount of 23.25 million representing fifty percent of the savings the EPC would have generated over a three year period. IP argues that because savings from the EPC plan have never been realized it owes UMC nothing and is not in breach. IP also argues that the EPC plan was not feasible, PEC would never have entered into a negotiated buy-all, sell-all relationship with IP and the EPC plan violated Pennsylvania law.

1. As suggested in Savings Area #4, UMC acquired for the benefit of IP-Erie an increase in the mill's sales and use tax exemption from 96 percent to 99 percent.

Neither party confines their argument to the four corners of the contract, though both assert that language used in the Energy Agreement is clear and unambiguous, thus precluding the need for parole evidence. Nonetheless, the pivotal phrase from the Energy Agreement, "we hereby authorize Utilities Management Consultants, Inc. (UMC) to . . . implement recommendations for possible savings", given the context within it was to operate, appears ambiguous and reference to parole evidence is necessary.²

II. UNRESOLVED ISSUES

A. Was UMC authorized to unilaterally implement the EPC plan?

On its face the agreement appears to give UMC broad authority to implement any savings proposal it suggests. This interpretation is supported by an Authorization and Release ("Authorization and Release") IP entered into on the same day the

2. Under Pennsylvania law, which governs this dispute, where the terms of a contract are clearly expressed, interpretation of those terms must be determined from the language itself. Fleetway Leasing Company v. Wright, 697 A.2d 1000, 1002 (Pa. Super. 1997)(citations omitted). A contract will be found ambiguous: "[i]f, and only if, it is reasonably or fairly susceptible to different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning." Metzger v. Clifford Realty Corp., 476 A.2d 1, 5 (1984). A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which from the nature of the language in general its meaning depends. Id. Only where the language in a written contract is ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties. Com., Dept. of Transp. v. Brozzetti, 684 A.2d 658, 663 (Pa. Commw. 1996)(citations omitted).

Energy Agreement was signed. The first paragraph of the Authorization and Release contains the following provision:

"We hereby authorize and appoint Utilities Management Consultants, Inc. (UMC) to implement any recommendation (s) based on UMC's study for any possible savings credits or refunds on our purchased utility (s) charges."
(emphasis in original).

Yet in actuality before implementing any of its four recommendations UMC sought additional approval from IP.³ It is not obvious that such additional approval was necessary, nonetheless it is apparent from the parties submissions that UMC was unwilling to proceed with the EPC plan without approval from IP's main office in Tennessee.

On the other hand, IP notes that it received both oral and written assurances from UMC prior to entering into the Energy Agreement that it would have the final say as to which energy savings recommendations would be implemented. For example, page ten of an introductory brochure IP received in November 1995 states:

3. The dictionary definition of the term "implement" is "to give practical effect to and ensure of actual fulfillment by concrete measures."

CLIENT SAVINGS

- **THE CLIENT IS ALWAYS THE FINAL ARBITER FOR THE IMPLEMENTATION OF THE PREFERRED SAVINGS STRATEGY.**

(emphasis in original)

Thus to be resolved at trial is the issue of whether based on the Energy Agreement and parole evidence UMC had absolute authority to implement its energy savings suggestions.

B. If UMC was authorized did IP block implementation?

As noted above, theoretically, if found to have the authority to implement the EPC plan UMC could have unilaterally contacted PEC, negotiated and put into action a buy-all, sell-all plan on IP's behalf. UMC claims, however, that IP blocked it from implementing the plan and that such obstruction constituted breach. UMC has not presented clear evidence of obstruction, only its rejected requests for additional approval.

Even without evidentiary support, UMC's claim of obstruction does not appear wholly unfounded. The nature and tenor of IP's argument and submissions make clear the fact that IP had no intention of facilitating UMC in putting the EPC plan into effect. Thus, a material issue for trial, assuming that UMC was authorized to implement the plan, is whether or not IP prevented UMC from taking such action.

C. Is implementation of the EPC plan feasible?

Even if UMC is authorized to implement the plan and IP is not obstructing this action IP presents several theories as to why the EPC plan is unfeasible, in an attempt presumably to assert some form of the defense of impossibility.⁴ UMC rebuts these theories. Evidence for and against consists only of dueling affidavits. On behalf of IP the affidavit of Ralph F. Paparella ("Paparella"), Director of Supply Planning for PEC, doing business as GPU Energy and on behalf of UMC the affidavit of Oliver Kasper ("Kasper"), the Manager of Pricing and Contract Administration for Pennsylvania Power & Light and co-developer of UMC's EPC recommendation.⁵

1. Is PEC capacity short?

First IP claims that PEC would not agree to enter into the buy-all, sell-all arrangement suggested by UMC. In his affidavit Paparella states that contrary to UMC's proposal, PEC

4. Although not specified as such, each of IP's theories could be the basis for argument that the contract provisions as they relate to the EPC project were impossible or impractical to carry out and therefore IP is discharged of any obligation to pay. Legal impossibility or impracticability is defined in § 261 of the Restatement (Second) of Contracts, which states "Where, after a contract is made a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless language or the circumstances indicate to the contrary. See Craig Coal Mining Co. v. Romani, 513 A.2d 437 (1986).

5. UMC notes that Paparella's name was not disclosed in self-executing discovery, consequently UMC has not had an opportunity to review his qualifications and the basis for his opinions.

has not been capacity short since January 1, 1996 and does not have any present capacity needs.

In response, Kasper refers to the Pennsylvania Electric Company Annual Resource Planning Report which was filed by PEC on May 1, 1995. According to Kasper, this document, which is attached to his affidavit, indicates that PEC was capacity short from 1996 until present and will continue to operate capacity short until the year 2014. As neither affidavit definitively settles the question of PEC's capacity this issue will have to be resolved at trial.

2. Does the EPC Plan violate Pennsylvania Regulations?

Again relying solely on Paparella's affidavit, IP claims that UMC's EPC plan would violate Pennsylvania Regulations found at 52 Pa.Code § 57.34(c). Paparella states that pursuant to § 57.34(c) purchases of energy must be done through mandatory competitive bidding, not through negotiated contracts as proposed by UMC.

Kasper acknowledges that § 57.34(c) requires mandatory competitive bidding but notes that the bidding requirement can be waived "if substantial reasons are present." Section 57.34(c)(8) entitled "Purchases outside of a bidding program" provides, in part: "When a utility and potential supplier of capacity resources intends to negotiate a purchased power contract outside of the utility's competitive bidding program, the parties shall

jointly file a petition for waiver The parties shall demonstrate that the transaction cannot be accommodated in the competitive bidding program and that the purchase is in the public interest from both a cost and reliability standpoint."

Kasper suggests two substantial reasons for waiver in the instant case: "1) long term rate savings to all customers of [PEC] and 2) economic development and preservation of jobs for an industry in Erie, PA." Thus, the issue as to whether or not PEC and IP could negotiate a contract can only be resolved through presentation of further evidence regarding, among other things, PEC's willingness to petition for a waiver and the likelihood that such a petition would be granted.

3. Is the EPC plan economically unsound?

Finally, IP argues that the price which PEC was willing to pay for electric energy as of May 6, 1996 was only 2.07 cents per KWH which is substantially less than the 8.5 cents per KWH price used in calculations for the EPC proposal. More importantly, the 2.07 rate is less than the price at which IP would have to purchase energy from PEC, 3.27 cents per KWH. Thus, IP asserts that the UMC plan is economically unfeasible. The basis for this argument is again Paparella's affidavit.

Kasper responds that the 2.07 cents per KWH rate quoted by Paparella represents the Marketing Clearing Price from the 1996 Annual Resource Plan filed by PEC December 30, 1997 and

therefore was not available at the time the EPC plan was formulated. Furthermore, Kasper refers to two documents attached to his affidavit, a "Rate Analysis - Penlec Coal Plant Proxy" and PEC's "Petition for Rate Recovery" both of which suggest that PEC would purchase from IP-Erie at a rate of 8.5 cents per KWH not at the 2.07 rate suggested by Paparella. Thus, the issue of economic feasibility cannot be resolved based on the present evidence.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UTILITIES MANAGEMENT	:	CIVIL ACTION
CONSULTANTS INC.,	:	
Plaintiff,	:	
	:	NO. 97-5865
v.	:	
	:	
INTERNATIONAL PAPER COMPANY,	:	
Defendant.	:	

O R D E R

AND NOW, this 18th day of May 1998, upon consideration of Defendant's motion for summary judgment (Docket No. 11), Plaintiff's answer thereto (Docket No. 13) and Defendant's request for leave to file a reply brief and for oral argument (Docket No. 15), it is hereby ordered that Defendant's motion is **DENIED**. Accordingly, Defendant's requests for leave to file a reply and for oral arguments are **DISMISSED** as moot.

BY THE COURT:

RONALD L. BUCKWALTER, J.